

**Florence Volunteer Fire Department, Inc. and Local
I-42, International Association of Fire Fighters,
AFL-CIO, CLC, Petitioner. Case 9-RC-13919**

December 14, 1982

DECISION AND ORDER

**BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on October 20 and 21, 1981, before Hearing Officer James Schwartz. Following the hearing, and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director for Region 9 transferred this case to the Board for decision. Thereafter, the Petitioner filed a brief in support of the petition.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board finds:

1. The Employer is a Kentucky nonprofit corporation engaged in providing fire protection services, on a contract basis, for the city of Florence, Kentucky, for industrial and rural residential customers situated outside the city limits. The parties stipulated that in 1980 the Employer received revenues in excess of \$150,000, \$45,000, and \$31,000 from the city and industrial and rural residential customers, respectively; that the city and the industrial firms annually purchase or sell goods or services valued in excess of \$50,000 across state lines; and that the Employer thereby meets the Board's monetary jurisdictional standard for nonretail enterprises. The Employer, however, claims that it shares the city's exemption under Section 2(2) of the Act on the grounds that the city directly created the Employer and that the Employer performs a municipal function for the city.

The Board's jurisdiction in these circumstances is controlled by the standard set forth in *National Transportation Service, Inc.*, 240 NLRB 565 (1979), which provides for Board determination of whether the employer itself meets the statutory definition of "employer," and, if so, whether it exercises sufficient control over its labor relations to enable it to bargain with a bargaining representative. The evidence as to "employer" status shows that the Em-

ployer was created by city ordinance in 1938, and that the first fire chief was appointed by the city council, but that it subsequently incorporated as a private, nonprofit corporation in 1941, and began operating independently based solely on voluntary financial contributions. Thereafter, beginning in 1968, the Employer contracted its services to the city and to rural homeowners in exchange for payment based on a percentage of assessed property value and to industrial customers for a fixed annual fee. In 1974, the Employer began to hire full-time paid firefighters in addition to retaining unpaid volunteers. The Employer's membership at the time of the hearing consisted of 14 paid full-timers and 45 to 50 volunteers.

The 1980 contract with the city shows that the city retains responsibility for enactment and enforcement of fire prevention legislation, that paid firefighters are included in the city's police and firemen's pension fund, and that the Employer accepts full liability for its efforts to extinguish fires. Record testimony further reveals that the Employer works closely with the city building inspectors regarding issuance of building and occupancy permits, and that it performs semiannual fire inspections of all commercial premises within the city. The Employer owns all of its fire equipment and apparatus as well as the main firehouse, and leases an auxiliary fire station from the city for a dollar a year. The employer prepares and customarily submits copies of its budget, quarterly financial statements, and names of prospective hires to the city council, but those submissions are apparently for informational purposes only as the city does not exercise approval rights over those matters. On the other hand, the submission of quarterly training records to the State, to obtain incentive pay for its full-timers who have completed prescribed training, requires prior certification by the city, and the resulting payments are forwarded to the city for transmittal to the Employer. The city's creating ordinance of 1938, which grants authority to the city for approval and removal of the fire chief, remains on the statute books, but the city has not exercised that authority over the fire chief since 1941. The fire chief testified for the Employer and indicated that, in the event of cessation of contractual arrangements with the city, the Employer would probably continue to operate by providing fire protection services to its industrial and rural residential customers.

The Employer's internal organizational structure consists of five elected corporate officers, an executive committee, and a fire chief. The duties of the officers include presiding over the monthly membership meetings, collecting all moneys, such as

finances and dues, and keeping records of receipts and disbursements. The executive committee, which is comprised of two paid members and four volunteers, and is chaired by the first vice president, has managerial responsibility over budgetary matters, manpower levels, hiring, firing, work schedules, wages, and other employee benefits, such as vacation and sick leave policies. All matters voted by the executive committee are submitted to the overall membership for approval. The extent to which paid members on the executive committee participate in decisions affecting themselves is unclear on the record. According to the fire chief, they either do not vote on any matters affecting paid personnel or disqualify themselves from attending such meetings, whereas the Petitioner's president testified that they abstain from voting only with respect to wages. All paid and unpaid members vote on all aspects of the Employer's operations in the ratification process.

The fire chief supervises the work duties of the firefighters and also carries out the directions of the executive committee. The parties stipulated that the fire chief is a supervisor; however, the record evidence reveals that his supervisory authority is limited. For example, the fire chief prepares work schedules for the members, evaluates their performance, and determines staffing requirements, but may not act in these areas on his own. He can reprimand members but cannot mete out harsher discipline, such as suspensions or discharge. Rather, in these areas and others, he is required first to make recommendations to the executive committee for its consideration. The executive committee in turn implements selected recommendations by submitting them to the membership for approval. In order to hire new personnel, the executive committee selects three individuals from outside the fire department and city government to serve on a personnel review board to accept applications and to administer uniform tests to all applicants. Thereafter, the executive committee selects the number of top-ranking candidates corresponding to the number of openings for recommendation to the membership.

From the foregoing and the record as a whole, it is clear that the Employer is a separate entity from the city, that it exercises almost complete autonomy over matters affecting its firefighters' terms of employment and working conditions, and that it is capable of engaging in meaningful collective bargaining. Accordingly, we find that it will effectuate the purposes of the Act to assert jurisdiction herein.

2. Local I-42, International Association of Fire Fighters, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. No question affecting commerce is presented concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The Petitioner seeks to represent a unit of full-time paid firefighters. The parties stipulated that the volunteer firefighters share no community of interest with the paid full-timers and should not be included in the unit. This proceeding was transferred to the Board, however, for consideration of an issue, raised at the hearing, as to the propriety of certifying a bargaining unit comprised of employees who participate in formulation of the Employer's management and labor relations policies.

The Petitioner argues that this case presents no impediment to representation of the paid members in light of the evidence that those who currently serve on the executive committee abstain from voting on matters involving wages and employee benefits, and suggests further that the Employer's bylaws can always be amended to preclude the prospect of a conflict of interest.¹ Moreover, it asserts that paid members comprised one-third of the executive committee and one-fourth of the total membership, and therefore they would not likely exercise "effective control" over the Employer's policies. We find, contrary to the Petitioner, that the paid firefighters are managerial employees not properly included in a bargaining unit, and, accordingly, we shall dismiss the petition.

The Board has excluded, as managerial employees, employee-shareholders who collectively constituted a majority and thereby were in a position to influence management policy; e.g., by their ability to determine selection and retention of individuals on the board of directors.² Similarly excluded were employee-shareholders who comprised only a minority, but the possibility of their influence on management policies was not remote.³ Here, contrary to the Petitioner's argument, the alleged lack of participation by paid members of the executive committee with respect to matters involving their wages and benefits is of little significance in view of the fact that each and every paid and unpaid member shares an equal voice in management decisions and no policy is set or implemented by the Employer without the ratification vote of the mem-

¹ The Petitioner further avers that it would bargain with the fire chief if it became the certified bargaining agent, and, if bargaining issues were voted on by committee or by the membership, unit employees would abstain. The facts do not demonstrate that the fire chief has sufficient authority to bargain on behalf of the Employer. Furthermore, our determination herein must be based on evidence in this record, and we are precluded from considering the Petitioner's proposals regarding amending the bylaws or revising existing procedures.

² *Sida of Hawaii, Inc.*, 191 NLRB 194 (1971).

³ *Brookings Plywood Corporation*, 98 NLRB 794 at 798 (1952).

bership at large. In these circumstances, we find that the paid members constitute a large homogeneous group clearly having the potential for influencing management policy by their participation in the ratification procedure, and are therefore excluded as managerial employees.⁴

ORDER

It is hereby ordered that the petition herein be, and it hereby is, dismissed.

⁴ *N.L.R.B. v. Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267 (1974); see also *N.L.R.B. v. Yeshiva University*, 444 U.S. 672 (1980).